

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

LAW OFFICES OF CORY J. HILTON,

Case No.2:23-CV-1151 JCM (NJK)

Plaintiff(s),

ORDER

v.

KARL DINKEL, et al.,

Defendant(s).

Presently before the court is defendant Principal Life Insurance Company (“Principal Life”)’s motion to dismiss. (ECF No. 6). Plaintiff Law Offices of Cory J. Hilton (“plaintiff”) filed a response (ECF No. 8), to which Principal Life replied. (ECF No. 15).

Also before the court is defendant Karl Dinkel (“Dinkel”)’s motion to dismiss. (ECF No. 10). Plaintiff filed a response (ECF No. 21), to which Dinkel replied. (ECF No. 24).

Also before the court is plaintiff’s motion to remand this case to state court. (ECF No. 9). Principal Life filed a response (ECF No. 19), to which plaintiff replied.<sup>1</sup> (ECF No. 23).

**I. Background**

This action arises out of a contractual dispute between plaintiff and defendants. On September 19, 2011, Dinkel was involved in a motor vehicle accident while on duty as a police officer in Henderson, Nevada. (ECF No. 1-4 at 3). Subsequently, Dinkel retained plaintiff to

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<sup>1</sup> Defendant Karl Dinkel joined in Principal Life’s response to plaintiff’s motion to remand. (ECF No. 20).

1 represent him in his workers' compensation claim against the City of Henderson. (*Id.* at 1-2, 3).  
2 Plaintiff and the City of Henderson eventually negotiated a settlement agreement related to  
3 Dinkel's workers' compensation claim. (*Id.* at 4).

4  
5 Dinkel also has a claim for long-term disability ("LTD") benefits under a policy insured  
6 by Principal Life that Principal Life argues is separate from his workers' compensation claim. (*Id.*  
7 at 3-4; ECF No. 6-1 at 2-3). Following settlement, plaintiff notified Principal Life of its alleged  
8 failure to acknowledge Dinkel's owed benefits. (ECF No. 1-4 at 5). Plaintiff then perfected an  
9 attorney's lien for fees and costs arising under the retainer agreement executed by plaintiff and  
10 Dinkel, constituting 40% of total recovery benefits arising from the litigation with the City of  
11 Henderson.<sup>2</sup> (*Id.*).

12  
13 Plaintiff filed its complaint against Principal Life and Dinkel, asserting causes of action for  
14 breach of contract and declaratory relief based on defendants' failure to respond to plaintiff's  
15 payment demand. (*Id.* at 4-6). Defendants seek dismissal of plaintiff's complaint. (ECF Nos. 6;  
16 10). Dismissal as to Principal Life is appropriate, as Principal Life is not a contemplated party in  
17 the retainer agreement executed by plaintiff and Dinkel. The court also grants Dinkel's motion to  
18 dismiss because the retainer agreement does not permit plaintiff to collect 40% of the LTD  
19 insurance proceeds.  
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21 Additionally, plaintiff filed a motion to remand the case to state court, alleging that  
22 Principal Life's removal to this court was defective because Principal Life never obtained Dinkel's  
23 consent to remove the case. (ECF No. 9). As explained, *infra*, Principal Life did not need to obtain  
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28 <sup>2</sup> Although the complaint is vague, the briefings clarify that the "recovery benefits" sought  
by plaintiff correspond to the LTD benefits received by Dinkel, exclusive of his workers'  
compensation claim. Accordingly, the issue before the court is whether plaintiff is entitled to a  
portion of the LTD benefits.

1 Dinkel's consent because Dinkel had not been served at the time of removal, thus nullifying the  
2 merits of plaintiff's motion to remand.

## 3 **II. Legal Standard**

### 4 **A. Motions to remand**

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6 Defendants may seek removal of a civil action under 28 U.S.C. § 1441. Conversely, a  
7 plaintiff may challenge removal by timely filing a motion to remand. 28 U.S.C. § 1447(c). On a  
8 motion to remand, the removing defendant must overcome the "strong presumption against  
9 removal jurisdiction" and establish that removal is proper. *Hunter v. Philip Morris USA*, 582 F.3d  
10 1039, 1042 (9th Cir. 2009) (quoting *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir.1992)). Due  
11 to this strong presumption against removal jurisdiction, the court resolves all ambiguity in favor  
12 of remanding the case to state court. *Id.*

### 14 **B. Motions to dismiss**

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16 A court may dismiss a complaint for "failure to state a claim upon which relief can be  
17 granted." Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must provide "[a] short and  
18 plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2);  
19 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed  
20 factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the  
21 elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

22  
23 "Factual allegations must be enough to rise above the speculative level." *Twombly*, 550  
24 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual  
25 matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (citation  
26 omitted).

27  
28 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply

1 when considering motions to dismiss. First, the court must accept as true all well-pleaded factual  
2 allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth.  
3 *Id.* at 678–79. Mere recitals of the elements of a cause of action, supported only by conclusory  
4 statements, do not suffice. *Id.* at 678.

5  
6 Second, the court must consider whether the factual allegations in the complaint allege a  
7 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint  
8 alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the  
9 alleged misconduct. *Id.* at 678.

10  
11 When the complaint does not permit the court to infer more than the mere possibility of  
12 misconduct, the complaint has “alleged—but not shown—that the pleader is entitled to relief.” *Id.*  
13 (internal quotation marks omitted). Additionally, when the allegations in a complaint have not  
14 crossed the line from conceivable to plausible, the plaintiff’s claim must be dismissed. *Twombly*,  
15 550 U.S. at 570.

16  
17 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202,  
18 1216 (9th Cir. 2011). The *Starr* court stated, in relevant part:

19 First, to be entitled to the presumption of truth, allegations in a complaint or  
20 counterclaim may not simply recite the elements of a cause of action, but must contain  
21 sufficient allegations of underlying facts to give fair notice and to enable the opposing  
22 party to defend itself effectively. Second, the factual allegations that are taken as true  
must plausibly suggest an entitlement to relief, such that it is not unfair to require the  
opposing party to be subjected to the expense of discovery and continued litigation.

23 *Id.*

24 If the court grants a Rule 12(b)(6) motion to dismiss, it should grant leave to amend unless  
25 the deficiencies cannot be cured by amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d  
26 655, 658 (9th Cir. 1992). Under Rule 15(a), the court should “freely” give leave to amend “when  
27 justice so requires,” and absent “undue delay, bad faith, or dilatory motive on the part of the  
28

1 movant, repeated failure to cure deficiencies by amendments . . . undue prejudice to the opposing  
 2 party . . . futility of the amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). The court  
 3 should grant leave to amend “even if no request to amend the pleading was made.” *Lopez v. Smith*,  
 4 203 F.3d 1122, 1127 (9th Cir. 2000) (*en banc*) (internal quotation marks omitted).

### 6 **III. Discussion**

#### 7 A. Plaintiff’s motion to remand

8 Plaintiff argues that the court should remand this case because Principal Life’s petition for  
 9 removal was procedurally defective. A defendant desiring to remove any civil action from a state  
 10 court shall file in the district court of the United States a notice of removal signed pursuant to Rule  
 11 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the  
 12 grounds for removal, together with a copy of all process, pleadings, and orders served upon such  
 13 defendant in such action. *See* 28 U.S.C. § 1446(a).

15 Plaintiff’s lone concern with Principal Life’s petition for removal is that Principal Life filed  
 16 its notice of removal before Dinkel had been served with the appropriate documents. (ECF No. 9  
 17 at 11). This argument does not hold muster.

19 Principal Life does not dispute that Dinkel had yet to be served with process at the time of  
 20 Principal Life’s filing of the removal notice. (ECF No. 19 at 3). However, binding authority from  
 21 the Ninth Circuit clarifies that Principal Life did not need to obtain Dinkel’s consent *because* he  
 22 had not been served when Principal Life filed its notice of removal. *See Salveson v. W. States*  
 23 *Bankcard Ass’n*, 731 F.2d 1423, 1429 (9th Cir. 1984) (“[o]ur circuit rule is that a party not served  
 24 need not be joined; the defendants summonsed can remove by themselves.”) (internal citations  
 25 omitted) (reversed on other grounds) (emphasis added).

27 This court has ruled in accordance with the Ninth Circuit in a case similar to the instant  
 28

1 matter. *See generally Fortunato v. Countrywide Home Loans, Inc.*, No. 2:12-cv-00360-JCM-PAL,  
2 2012 WL 13055160 (D. Nev. Apr. 6, 2012) (denying plaintiff's motion to remand and finding  
3 removal not defective where one defendant filed a notice of removal prior to the other defendant  
4 being served).

5  
6 Although the court can stop its analysis and rest on the binding authority and its prior  
7 ruling, it is worth noting that even if removal were defective, plaintiff's motion still would fail.  
8 "A procedural defect existing at the time of removal but cured prior to entry of judgment does not  
9 warrant reversal and remand to state court." *Destfino v. Reiswig*, 630 F.3d 952, 957 (9th Cir.  
10 2011).

11  
12 Dinkel appeared in this case on August 17, 2023, when he filed his motion to dismiss.  
13 (ECF No. 10). He filed his consent to removal on that same date. (ECF No. 11). Dinkel's consent  
14 thus cured any alleged defect regarding removal.

15  
16 Although plaintiff states in its reply that it "withdraws its formal countermotion [to remand]  
17 inasmuch as the discrepancies giving rise to this motion have been cured," the court has already  
18 established that no discrepancies ever existed, as Principal Life's removal was proper. (ECF No.  
19 23 at 3). The court denies plaintiff's motion to remand.

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21 B. Principal Life's motion to dismiss

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23 Principal Life posits that the court should grant its motion to dismiss because it is not a  
24 contemplated party in the retainer agreement executed by plaintiff and Dinkel.

25  
26 *i. Breach of contract*

27  
28 Plaintiff alleges that Principal Life breached and continues to breach the retainer agreement  
by failing to pay the attorney's fees owed pursuant to Dinkel's awarded LTD benefits.

"A breach of contract may be said to be a material failure of performance of a duty arising

1 under or imposed by agreement.” *Bernard v. Rockhill Dev. Co.*, 734 P.2d 1238, 1240 (Nev. 1987)  
2 (citation omitted). To prevail on a claim for breach of contract, a plaintiff must demonstrate (1)  
3 the existence of a valid contract; (2) that the plaintiff performed or was excused from performance;  
4 (3) that the defendant breached the contract; and (4) that the plaintiff sustained damages. *Calloway*  
5 *v. City of Reno*, 993 P.2d 1259, 1263 (Nev. 2001); *see also Sierra Dev. Co. v Chartwell Advisory*  
6 *Group, Ltd.*, 223 F. Supp. 3d 1098, 1103 (D. Nev. 2016).

8       There is no contractual privity between plaintiff and Principal Life. The retainer agreement  
9 was entered into by plaintiff and Dinkel only, not Principal Life. (ECF No. 1-4 at 4). The  
10 complaint specifically alleges that “[o]n or about October 18, 2011, Defendant KARL DINKEL  
11 engaged Plaintiff LAW OFFICES OF CORY J. HILTON to recover monetary benefits through an  
12 administrative action . . . .” (*Id.*). Principal Life was never a party to the retainer agreement, and  
13 thus cannot be held liable for breach of contract. *See Albert H. Wohlers and Co. v. Bartgis*, 969  
14 P.2d 949, 959 (holding that a breach of contract claim fails absent an actual contractual relationship  
15 between the parties).  
16

17  
18       Additionally, the January 23, 2019, settlement pertained to Dinkel’s workers’  
19 compensation claim. (ECF Nos. 1-4 at 3-4.) Principal Life issued Dinkel his LTD policy and was  
20 not involved with his workers’ compensation claim. (ECF No. 6-1 at 2).

21       The argument that Principal Life had contractual privity with plaintiff because Principal  
22 Life acted as Dinkel’s agent is convoluted, conclusory, and is neither supported by any facts in the  
23 record nor legal authority. (ECF No. 8 at 8-10). The court grants Principal Life’s motion to  
24 dismiss as to plaintiff’s cause of action for breach of contract. *See Epstein v. Wash. Energy Co.*,  
25 83 F.3d 1136, 1140 (9th Cir. 1996) (“conclusory allegations of law and unwarranted inferences  
26 are insufficient to defeat a motion to dismiss for failure to state a claim.”).  
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1                    **ii.        *Declaratory relief***

2            Plaintiff asserts a cause of action against Principal Life for declaratory relief. The court  
3            adopts Principal Life’s argument that this claim is wholly derivative of plaintiff’s claim for breach  
4            of contract.

5            Plaintiff uses the wrong procedural vehicle to bring its claim for declaratory relief.  
6            Although plaintiff mistakenly believes that the Nevada Declaratory Judgment Act is applicable to  
7            this case, the federal Declaratory Judgment Act indeed applies. *See Krave Ent., LLC v. Liberty*  
8            *Mut. Ins. Co.*, 667 F. Supp. 2d 1232, 1237 (D. Nev. 2009) (ruling that the federal Declaratory  
9            Judgment Act applies in cases removed based on diversity jurisdiction).

10           This court has ruled that the Declaratory Judgment Act does not create a new, independent  
11           cause of action. *See Buesing Corp. v. Helix Elec. of Nev., LLC*, No. 2:16-cv-01439-JCM-NJK,  
12           2019 WL 1290857, at \*7 (D. Nev. Mar. 20, 2019) (dismissing a claim for declaratory relief “to  
13           the extent it purports to create a cause of action.”).

14           Accordingly, plaintiff’s claim for declaratory relief is dismissed, as it is derivative of its  
15           claim for breach of contract and is improperly asserted as an independent cause of action.

16           **C. Dinkel’s motion to dismiss**

17           Regarding Dinkel’s motion to dismiss, the court will analyze plaintiff’s breach of contract  
18           claim only, as the court has established, *supra*, that the Declaratory Judgment Act does not create  
19           a new, independent cause of action.

20           The court need not tarry in its analysis, as the plain language of the retainer agreement  
21           makes it readily apparent that the retainer agreement pertained to sums collected from the workers’  
22           compensation action against the City of Henderson only, not plaintiff’s LTD benefits.

23           Plaintiff believes it is entitled to 40% of the LTD insurance proceeds issued to Dinkel.  
24             
25             
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1 (ECF No. 1-4 at 4). To determine whether plaintiff is correct in its supposition, the court must  
2 turn to the plain language of the retainer agreement, which is the operative document in this case.  
3 *See Keife v. Metro. Life Ins. Co.*, 797 F. Supp. 2d 1072, 1075 (D. Nev. 2011) (“[u]nder Nevada  
4 law . . . [t]he starting point for the interpretation of any contract is the plain language of the  
5 contract.”) (internal citations omitted).

7 The retainer agreement states the following:

8 Client retains said LAW FIRM to represent CLIENT as CLIENT’S attorney(s) in a  
9 claim or action against City of Henderson, Las Vegas, Nevada and/or whomever may  
10 be liable, arising out of an incident which occurred on September 18, 2011.

11 (ECF No. 6-1 at 106). Dinkel retained plaintiff to represent him in his workers’ compensation  
12 claim against the City of Henderson. (ECF No. 1-4 at 1-2, 3).

13 The retainer agreement is silent about Dinkel’s LTD benefits, which are separate from the  
14 workers’ compensation claim against the City of Henderson. Furthermore, the retainer agreement  
15 makes no reference to pursuing the proceeds of Dinkel’s disability policy issued by Principal Life.

16 Thus, while the retainer agreement between plaintiff and Dinkel is a contract, Dinkel did  
17 not breach the contract, as he is under no obligation to pay plaintiff 40% of his ongoing LTD  
18 benefits. (ECF No. 6-1 at 106-07). The court grants Dinkel’s motion to dismiss as to plaintiff’s  
19 cause of action for breach of contract.  
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#### 21 **IV. Conclusion**

22 Accordingly,

23  
24 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant Principal Life  
25 Insurance Company’s motion to dismiss (ECF No. 6) be, and the same hereby is, GRANTED.


26 IT IS FURTHER ORDERED that defendant Karl Dinkel’s motion to dismiss (ECF No.  
27 10) be, and the same hereby is, GRANTED.  
28

1 IT IS FURTHER ORDERED that plaintiff Law Offices of Cory J. Hilton's motion to  
2 remand this case to state court (ECF No. 9) be, and the same hereby is, DENIED.

3 Plaintiff's claims for breach of contract and declaratory relief are dismissed with prejudice.

4 The clerk is instructed to keep this case open, as defendant Karl Dinkel has a pending  
5 counterclaim against plaintiff. (ECF No. 31).  
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7 DATED February 28, 2024.  
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UNITED STATES DISTRICT JUDGE  
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